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Supreme Court of the United States

October Term, 1948.

No. 9.

CHARLES KOVACS,

Appellant,

v.

ALBERT COOPER, JR., Judge of the First District Police Court of Trenton,

Appellee.

Appeal from the Court of Errors and Appeals of the State of New Jersey.

Brief for Appellee

LOUIS JOSEPHSON,
Counsel for Appellee.

VanBuskirk Press, Inc., Trenton, N. J.

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vs.

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Appellee.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

BRIEF FOR APPELLEE.

STATEMENT OF CASE.

For the purpose of correcting what appears to be an inaccurate statement relating to the specific section or provision of the *Legislation Drawn in Question* on page 3, of the appellant's brief. Respondent desires to call attention to the fact that the only portion of the ordinance of the City of Trenton involved in this appeal is Section 4, which reads as follows:

> "4. That it shall be unlawful for any person, firm or corporation, either as principal, agent or employee, to play, use or operate for advertising purposes, or for any other purpose whatsoever, on or upon the public streets, alleys or thoroughfare in the City of Trenton, any device known as a sound truck, loud speaker or sound amplifier, or radio or phonograph with a loud speaker or sound amplifier, or any other instrument known as a caliope or any instrument of any kind or character which emits therefrom loud and raucous noises and is attached to and upon any vehicle operated or standing upon said streets or public places aforementioned."

The basis of the charge and the conviction against the appellant is that he violated the above mentioned section of the ordinance, in that he used upon the public streets of the City of Trenton, a sound truck which emitted therefrom loud and raucous noises. No other section of the ordinance is involved in any manner whatsoever in this appeal.

ARGUMENT.

Point I.

The ordinance does not deprive appellant or any other person of any constitutional right.

(a) The ordinance is not a complete prohibition.

Appellant's brief is replete with suggestions that the ordinance under attack "is comprehensive in its ban," "prohibits entirely," and "lays down an absolute ban" on the use of sound amplifying devices. But such suggestions do violence to what is a clear expression in the ordinance not to prohibit, but to permit within reasonable bounds, the full and complete exercise of the constitutional right of free speech.

Stripped of the surrounding verbiage, the pertinent portion of Section 4 of the ordinance, and it is this Section which is under attack, reads as follows:

> "It shall be unlawful * * * to play, use or operate * * * on the public streets * * * a sound truck * * * *which emits therefrom loud and raucous noises.*" (Emphasis supplied.)

Sound trucks, per se, are not banned. Only sound trucks *which emit loud and raucous noises* are prohibited from operating on public streets, *and it was for this offense that appellant was arrested, tried and convicted.*

Not only does appellant beseech this Court to extend the right of free speech to include the use of a sound truck as an inalienable part of that right, but apparently it is also

being requested to extend the doctrine to include "loudness and raucousness" as an inseparable component of that basic constitutional freedom.

It is submitted that if the imputations which appellant attributes to the ordinance are correct, the ordinance would have provided that "it shall be unlawful to play, use or operate on the public streets a sound truck" with no subsequently qualifying provision as to the *manner* in which sound trucks may or may not be operated.

But the ordinance does not so read, for it sets up a dividing boundary line beyond which the police power of the state may not go and the extent to which civil liberties will be protected. The ordinance only creates a "blanket" ban on the use of sound trucks *when such use becomes "loud and raucous"*. As stated in *Cox v. New Hampshire*, 312 U. S. 569, 61 Sup. Ct. 762, 85 L. ed. 1049, 133 A. L. R. 1396 (1941), and as quoted in a dissenting opinion in the case of *Saia v. People of the State of New York*, 334 U. S. 558, 68 Sup. Ct. 1148,——L. ed——(1948),

> "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society *maintaining public order* without which liberty itself would be lost in the excesses of unrestrained abuses." (Emphasis supplied.)

Mr. Justice *Holmes* realized the seriousness of extending the constitutional rights protected under the Fourteenth Amendment so as to devitalize the police powers of the states and in *Baldwin v. Missouri*, 281 U. S. 586, he sounded his concern in the following language:

> "I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what

> I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable."

Clearly, our society is and must continue to be sufficiently broad to encompass, primarily the protection of the freedoms, and secondarily, but concurrently, the exercise of the vitality of the states' authority—the police powers.

(b) The ordinance does not create a previous restraint upon the exercise of any constitutional right.

The vice of the legislation which was invalidated in the case of *Saia v. People of the State of New York,* supra; *Cantwell v. Connecticut,* 310 U. S. 296, 60 Sup. Ct. 900, 84 L. ed. 1218 (1940); *Lovell v. Griffin,* 303 U. S. 444, 58 Sup. Ct. 666, 82 L. ed. 949 (1938); and *Hague v. C. I. O.,* 307 U. S. 496, 59 Sup. Ct. 954, 83 L. ed. 1423 (1939), is non-existent in this case. In *Saia v. People,* supra, an effective previous restraint was held to exist where it was necessary to secure a permit from the Chief of Police before a sound truck could be operated. In *Cantwell v. Connecticut,* supra, a statute which prohibited solicitation for religious, charitable, or philanthropic causes without prior approval of the secretary of the public welfare council was declared invalid as an intolerable previous restraint upon the freedom of religion. In *Lovell v. Griffin,* supra, it was held that an ordinance which prohibited the distribution of literature of any kind, at any time, at any place, and in any manner without a permit from the city manager was "void on its

face," the Court remarking that "while this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision." In *Hague v. C. I. O.*, supra, an ordinance which required a permit from a local official as a condition to a public assembly was also declared void on its face as a previous restraint on constitutionally guaranteed freedom of speech.

In all the cases just cited, a previous restraint was clearly placed upon constitutionally guaranteed freedoms. In the case at hand, however, there is no such previous restraint upon the use of sound trucks on the public streets of the City of Trenton, nor to the exercise of the right of free speech. The sole condition, and this condition is not a "previous restraint," is that *after* the sound amplifying equipment of a sound truck begins to operate on the city streets, it will not do so *loudly or raucously.* The restraint, if in fact any at all be deemed to exist, is impossible not by any public official, but by the very person who is seeking to exercise his constitutional rights. *He* must insure that his activities do not become "loud and raucous". If the previous restraint doctrine would extend to such a condition, then "loudness and raucousness" would become an inseparable and inviolable part and parcel of the right of free speech. If such were the case, one could quite successfully contend that since the ordinance does not permit loudness and raucousness, there is a restraint on the free exercise of speech which is guaranteed by the Federal Constitution. Such a result, it is obvious, would extend it to those limits which this Court of *Chaplinsky v. New Hampshire*, 315 U. S. 568, 62 Sup. Ct. 766, 86 L. ed. 1031 (1942), has declared cannot be included in the right of free speech. In

the *Chaplinsky* case, free speech was held not to include the right to utter obscenities, the right being clearly limitable.

(c) The ordinance does not establish any type of administrative censorship.

As this Court has pointed out in the *Saia*, *Cantwell*, *Lovell*, and *Hague* cases, supra, administrative censorship of constitutional liberties cannot be tolerated as such censorship could amount to the absolute suppression of, or serious limitation to, these liberties.

But an examination of the decisions of this Court which have stricken down measures establishing administrative censorship discloses that *permits were required prior* to the exercise of freedom of speech, freedom of assembly, or freedom of religion. And the issuance of these permits was made a matter of administrative discretion. The defect in these measures was, thus, subjection of a constitutional right, or the exercise thereof, to the uncontrolled discretion of a public official who, as he desired, could restrain or censor completely the exercise of such inherent rights.

It is submitted that the complete absence of any possibility of censorship in the ordinance places this case in an entirely different category from the landmark decisions, heretofore cited, on the administrative censorship of constitutional freedoms, and cannot be decided upon the authority of those cases.

Point II.

The right of freedom of speech does not embrace the right to use a sound truck, much less the right to use such sound truck in a "loud and raucous" manner.

The case of *Saia v. People of the State of New York*, supra, has been invoked as the basis for contending that the right of free speech embraces the right to use a sound truck. In effect, appellant goes further. He urges that such sound truck may operate "loudly and raucously" as a part of the right of free speech. But what does the *Saia* case decide?

The majority opinion, after outlining the facts, states that the ordinance is unconstitutional because "it established a previous restraint on the right of free speech"; that to use a loud-speaker, "one has to get a permit from the Chief of Police"; and that "there are no standards prescribed for the exercise of his discretion." Thus far, the decision clearly follows the *Cantwell, Lovell,* and *Griffin* cases, *supra*. Then the majority states, after reciting the holdings in those three cases, that the ordinance *"has the same defects."* The Chief of Police "stands athwart the channels of communication as an obstruction which can be removed only after criminal trial and conviction and lengthy appeal." The decision is made. Nothing further is necessary to the conclusion reached. The Court found an "effective" previous restraint and struck it down. The rest is dicta.

Upon the language of the ensuing paragraphs appellant seeks to base and sustain his position that the right of free speech includes the right to operate a sound truck "loudly and raucously." Appellant overlooks one salient feature of this language and that is that the Supreme Court *did not*

express its willingness in the *Saia* case to extend the right of free speech to the use of "loud and raucous" sound trucks.

The Court recognized the place in modern society for the loud-speaking device and its peculiar characteristics of being able to "reach" the people. Similarly, the Trenton ordinance recognizes the usefulness of these devices, because it authorizes their operation. The *Saia* case did not say that the loud speaker could be used "loudly and raucously." In fact, the majority explicitly recognized that the manner of their use could be locally regulated. It said, "Noise can be regulated by regulating decibels." And what are decibels? The measure of volume. The standard applied. The line at which police power regulations and civil liberties meet and do not conflict. And what does the Trenton ordinance do? It regulates decibels. It specifies "loudness and raucousness" as the standard beyond which noise from sound trucks may not go; as the line beyond which civil liberties invade the proper, regulable sphere of the police power. It, in short, complies with the method which the majority in the *Saia* case approved.

If appellant's position were sustained, it would be impossible to "regulate noise by regulating decibels" which the Supreme Court has said municipalities may do, for the present objections run to the extent or the manner in which sound trucks may be regulated. And the extent or manner has been prescribed by the ordinance as not "loud and raucous."

The ordinance permits all noises emanating from sound trucks except those noises which are "loud and raucous." On its face, a reasonable standard is created.

Appellee contends, therefore, that this Court has not, and should not, extend the right of free speech to include the right to use a sound truck, or to use any sound amplifying device in a "loud and raucous" fashion.

Point III.

Section 4. of the ordinance is specific, clear, definite and certain.

Appellant in his brief under Summary of Argument, page 33, contends that Section 4, of the ordinance is obscure, vague and indefinite, so as to make them impossible of reasonable interpretation, and for those reasons the same is unconstitutional.

In an attempt to establish such contention appellant cites and repeats some of the provisions of other and distinct sections and provisions of the ordinance in question not contained in Section 4, which as hereinabove stated is the only portion of the ordinance in issue in the case at bar. Attention of the Court being called to the fact that Section 4 contains no reference whatsoever to necessary or unnecessary noises; to what is reasonable or unreasonable; what is harsh, prolonged or unnatural or unusual; or what amounts to annoyance or inconvenience of persons. All of said phrases and provisions being contained in other sections of the ordinance not before the Court in the case at bar. All that Section 4 deals with and prohibits is the use of sound trucks on the public streets which emits therefrom *loud and raucous noises*.

Appellee, therefore, submits that even if there was any merit to said contentions, as to the other sections of the ordinance in question, they have no applicability to the case before the Court. It being submitted that no authority need be cited to establish to this Court that:

> "The review of an entire ordinance will not be made where the appellant is affected by only a single feature

of the same," and "Where the portion of an ordinance which is or may be invalid is distinctly separable from the remainder, and the remainder in itself contains the essentials of a complete enactment, the invalid portion may be rejected and the remainder may stand as valid and operative."

As to the contention of the appellant that Section 4 of the ordinance is obscure, vague and indefinite, appellee submits the answer of the Supreme Court of New Jersey in the case at bar to said contention, contained in the Transcript of Record, page 15:

"There is no merit to the contention that the ordinance is so obscure, vague and indefinite as to violate Section 1, Article 1 of the New Jersey Constitution and the Fourteenth Amendment of the Federal Constitution.

"Only Section 4 of the ordinance, upon which the prosecutor was convicted, is relevant. In simple, unambiguous language it prohibits the use upon the public streets of any device known as a sound truck, loud speaker or sound amplifier. This is the only charge made against the defendant in the complaint. The phraseology of the statute should leave no doubt in the mind of anyone of common intelligence as to what is forbidden."

CONCLUSION.

Appellee does not question the fact that public streets, parks, highways and plazas are natural and proper places for the dissemination of ideas and information. Nor does appellee argue with the proposition that an interference

with the right to be heard might invade the constitutional right of freedom of speech. Appellee does seriously question, however, the right of an individual to employ a sound truck "loudly and raucously" on city streets. If such operation could be considered a valid exercise of constitutional liberties, all police power measures which, in any fashion, merely touch these liberties, would be required to be stricken down. Such a result would swiftly lead to the chaotic conditions which have been recognized as culminating in the disintegration of the states' police powers and the ultimate downfall of the Constitution and its protective amendments which are now being invoked.

True, civil liberties must be maintained in a highly preferred position. But civil liberties and police power regulations are not irreconcilable. Each can occupy their respective orbs and at the same time maintain their individual integrity. Neither need be sacrificed for the other. If the police power prohibition of "loud and raucous" noises emanating from sound trucks invades the sphere of civil liberties, then it is clear that the field has been so completely preempted by civil liberties that a complete discarding of the police power rights of states would be necessitated.

To argue that the ordinance in this case is not a regulation, but a "complete" prohibition is in apposition to the very terms of the ordinance itself for the "sole" prohibition is loudness and raucousness. Sound trucks may be operated on the public streets of the city; loud speakers mounted upon such trucks may disseminate the opinions of their owners or operators; and sound trucks may, without previous restraint and without administrative censorship, freely move about. To read the ordinance otherwise is to distort its terms and its clearly-expressed intention. To say that the Trenton ordinance is "identical" with the ordi-

nance declared void in the *Saia* case, supra, reflects a failure to distinguish between the character of two ordinances which are widely separated in their methods of regulation.

Appellee therefor submits that "loud and raucous" noises emitted from sound trucks properly belongs to that field of prohibition which the state under its police power can regulate and that the ordinance here under attack is constitutional and valid and this appeal should be dismissed.

Respectfully submitted,

LOUIS JOSEPHSON,
Counsel for Appellee.